

Before the
Federal Communications Commission
Washington, DC 20554

ORIGINAL

In the Matter of)
)
Revision of the Commission's Rules to Ensure)
Compatibility with Enhanced 911 Emergency)
Calling Systems)
)
Request for Waiver by Cingular Wireless LLC)
)
)

CC Docket No. 94-102

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

To: The Commission

PETITION FOR RECONSIDERATION

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SUMMARY

Cingular Wireless LLC (“Cingular”) is a telecommunications provider, not a manufacturer. It has worked extensively with equipment vendors and PSAPs to develop and deploy a technology capable of supplying Phase II E911 information. Yet, Cingular was the only GSM carrier referred to the Enforcement Bureau for failing to meet the October 1, 2001 deployment deadline that was waived for every other requesting carrier.

Cingular seeks reconsideration of the Commission’s *Order* (i) requiring Cingular to begin selling E-OTD capable handsets on October 1, 2001, despite the *Order*’s acknowledgment of evidence that the handsets would not be commercially available from manufacturers (and to satisfy other deployment benchmarks); (ii) referring to the Enforcement Bureau the issue of whether Cingular violated the October 1, 2001 deadline, even though the FCC knowingly granted Cingular’s waiver on the basis of obsolete information; (iii) ignoring voluminous evidence that the Phase II accuracy and deployment requirements were “technologically infeasible;” (iv) establishing a strict liability standard where benchmarks are missed and precluding consideration of information from vendors regarding equipment availability; and (v) refusing to rule on Cingular’s TDMA waiver simply because the agency could not get to it even though there were no deadlines for waiver filings or FCC action.

For some time, Cingular had been unable to identify a technology capable of satisfying the Commission’s Phase II rules for its GSM and TDMA networks. Thus, on July 6, 2001, Cingular sought a waiver of the Commission’s Phase II E911 rules that would permit it to deploy E-OTD as a handset-based solution in its GSM markets and a switch-based solution in its TDMA markets. With respect to its GSM markets, Cingular requested a temporary waiver of the accuracy requirement for handset-based solutions and “commit[ted] to an aggressive handset rollout” based on vendor commitments. In late September, however, equipment vendors informed Cingular that E-OTD handsets would not be available in time to meet its proposed deployment schedule. Shortly thereafter, and before adoption of the *Order*, Cingular informed the Commission that it would be impossible to satisfy the deployment schedule proposed in its waiver.

On October 5, 2001, the Commission released the *Order* that acknowledges the submission of the new vendor information by Cingular. Despite the receipt of this information, however, the *Order* refuses to take it into account and instead held Cingular to its original and obsolete deployment schedule, and made the accuracy waiver contingent thereon. This was clear error. Cingular urges the Commission to reconsider its decision for the following reasons:

- The Commission unreasonably ignored the fact that the October 1, 2001 deadline cannot be satisfied because E-OTD equipped handsets are not available from any source;
- The Phase II E911 rules and the Phase II deployment deadlines established by the *Order* are unenforceable and lacking in any foundation because they are impossible to satisfy;

- By ignoring critical evidence regarding equipment availability, the Commission failed to give Cingular's waiver the "hard look" required by *WAIT Radio* and applied a discriminatory waiver standard because this evidence was considered in other waiver cases;
- The *Order* improperly establishes a strict liability standard for failure to satisfy E911 conditions that deem a carrier in automatic violation with no opportunity to be heard and refuses to consider evidence of impossibility based on vendors failing to produce compliant equipment; and
- It was clear error to refuse to rule on Cingular's TDMA waiver given that the FCC established no deadlines for filing waiver requests and had no statutory or rule deadline by which to act.

Cingular was recently informed by its handset vendors that E-OTD capable handsets will be available for sale to consumers as early as late second quarter 2002, after anticipated testing on networks modified to support E-OTD. There is evidence to support these claims. E-OTD handsets are now available for lab testing and are awaiting deployment of necessary switch-modifications in a network to complete testing. Thus, assuming the availability of labs and live networks for testing, Cingular expects handsets to be available from a variety of vendors by third quarter 2002. Based on these commitments, the Commission should reconsider and revise Cingular's E-OTD handset deployment schedule as follows:

- One E-OTD handset model must be made available for sale by September 1, 2002;
- 50% of all GSM handsets sold in Cingular's markets must be E-OTD capable by February 28, 2003;
- 100% of all GSM handsets sold in Cingular's markets must be E-OTD capable by June 30, 2003; and
- 95% of Cingular's GSM customers must have location-capable handsets by December 31, 2005.

Cingular continues to strive to deploy Phase II E911 in an expeditious manner. Given the importance of these services to consumers, competitive forces will ensure that Cingular makes E-OTD handsets available as soon as they are commercially available. Amending the deployment schedule as proposed would not alter the ultimate deadline for completing Phase II E911 deployment – December 31, 2005. Cingular seeks an interim deployment schedule that conforms to the commercial availability of E911 technologies.

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To: The Commission

PETITION FOR RECONSIDERATION

Cingular Wireless LLC ("Cingular"), on behalf of its subsidiaries and affiliates,¹ hereby requests reconsideration of the Commission's *Order*² (i) requiring Cingular to begin selling E-OTD capable handsets on October 1, 2001 and at a set pace thereafter; (ii) referring to the Enforcement Bureau the issue of whether Cingular violated the October 1, 2001 deadline; (iii) ignoring voluminous evidence that the Phase II accuracy and deployment requirements were "technologically infeasible;" (iv) establishing a strict liability standard for assessing future compliance with Phase II obligations, which precludes consideration of vendor readiness; and (v) refusing to consider Cingular's TDMA waiver request and referring the matter to the Enforcement Bureau, even though there were no deadlines for waiver filings or FCC action.

As discussed below, the *Order* should be reconsidered because it imposes conditions that the Commission knows are impossible to satisfy. Cingular urges the Commission to change the deployment benchmarks contained in the *Order* to accurately reflect the most recent vendor

¹ Throughout this filing, the term Cingular is used to refer to Cingular, its predecessors-in-interest, subsidiaries, and affiliates.

² *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Request for Waiver by Cingular Wireless LLC*, CC Docket No. 94-102, *Order*, FCC 01-296 (rel. Oct. 12, 2001) ("*Order*").

information regarding equipment availability. A carrier should only be found in violation of the E911 requirements if compliant solutions develop in time, and in sufficient quantities, to permit compliance with the rules, assuming the FCC's reporting requirements are met. At a minimum, a carrier must be given notice of an apparent violation and a meaningful opportunity to respond before the Commission makes any determination that E911 requirements have been violated.

BACKGROUND

Adoption of the E911 Regulations

In 1996, the Commission adopted rules to ensure the availability of 911 services via wireless handsets.³ Because of the transient nature of wireless callers, the Commission required most commercial mobile radio service ("CMRS") licensees ("covered carriers") to provide the location of 911 callers to public safety answering points ("PSAPs"). The deadlines for supplying Phase II location information are contained in Sections 20.18(e)-(h) of the Commission's rules and vary depending upon the technology used to provide the information.⁴ For covered carriers opting to deploy handset-based solutions, the rules require the following:

- At least one entry-level handset model with location capability must be offered no later than October 1, 2001;
- At least 25 percent of all new handsets activated must be location-capable no later than December 31, 2001;
- At least 50 percent of all new handsets activated must be location-capable no later than June 30, 2002;
- 100 percent of all new digital handsets activated must be location-capable no later than December 31, 2002; and

³ *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 18676, 18712 (1996).

⁴ 47 C.F.R. §§ 20.18(e)-(h).

- 95 percent of all handsets must be location-capable by December 31, 2005.⁵

The accuracy requirements also vary depending upon the type of technology deployed:

- Network-based technologies: 100 meters for 67 percent of calls; 300 meters for 95 percent of calls;⁶
- Handset-based technologies: 50 meters for 67 percent of calls; 150 meters for 95 percent of calls.⁷

The Commission recognized, however, that waivers of these requirements may be necessary and stated that any such requests be “specific, focused, and limited in scope, with a clear path to full compliance.”⁸ Carriers seeking waivers were instructed “to come as close as possible to full compliance.”⁹ This waiver mechanism was essential because no technology existed that could actually meet the accuracy and deployment requirements at the time the rules were adopted.¹⁰ As the *Order* acknowledges:

During the course of the E911 proceeding, the Commission recognized that *the E911 deployment schedule was aggressive in light of the need for further technological advancement*. Nonetheless the Commission predicted that ALI technologies would generally be available in sufficient time for carriers to comply.¹¹

Cingular routinely kept the Commission informed that, despite technological advancements, there was no solution capable of supplying E911 information as required by the

⁵ 47 C.F.R. § 20.18(g); *see Order* at ¶ 4.

⁶ *Id.* at § 20.18(h)(1).

⁷ *Id.* at § 20.18(h)(2).

⁸ *Order* at ¶ 7 (citing *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Fourth Memorandum Opinion and Order*, 15 FCC Rcd. 17442, 17457 (2000) (“*Fourth MO&O*”)).

⁹ *Order* at ¶ 7 (citing *Fourth MO&O*, 15 FCC Rcd. at 17457).

¹⁰ *See Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Memorandum Opinion and Order*, 12 FCC Rcd. 22665, 22723 (1997).

¹¹ *Order* at ¶ 6 (citing *Fourth MO&O*, 15 FCC Rcd. at 17457-58 (emphasis added)).

Commission's rules. It submitted information repeatedly beginning in January 1995 through the present indicating that nothing worked.¹²

Cingular's GSM and TDMA Waiver Requests

At least 86 petitions were filed with the Commission seeking waivers of the October 1, 2001 deployment benchmark, including petitions by every major carrier. More than half of the carriers seeking waivers, including Cingular, sought to deploy handset-based solutions.¹³ The

¹² See, e.g., BellSouth Comments, CC Docket No. 94-102, at 15 (Jan. 9, 1995); BellSouth Reply Comments, CC Docket No. 94-102, at 4 (Mar. 17, 1995) (citing PCIA Comments, CC Docket No. 94-102, at 8 (Jan. 9, 1995)); BellSouth Reply Comments, CC Docket No. 94-102, at 8 (Oct. 23, 1996) (emphasis added); Southwestern Bell Mobile Systems, Inc. Reply Comments, CC Docket No. 94-102, at 6-7 (Oct. 25, 1996); BellSouth *Ex Parte* Presentation, CC Docket No. 94-102, at 3 (Aug. 27, 1999); BellSouth *Ex Parte* Presentation, CC Docket No. 94-102, at 15 (Sept. 2, 1999); BellSouth Reply Comments, CC Docket No. 94-102, at 1 (Mar. 2, 2000); BellSouth *Ex Parte* Presentation, CC Docket No. 94-102, at 1, 8 (May 17, 2000); Cingular Wireless LLC Report on Implementation of Wireless E911 Phase II, CC Docket No. 94-102, at 3 (Nov. 9, 2000); Cingular *Ex Parte* Presentation, CC Docket No. 94-102, at 3 (Jan. 31, 2001); Cingular Interactive *Ex Parte* Presentation, CC Docket No. 94-102, at 1 (Mar. 12, 2001); Cingular Wireless LLC, Request for Waiver of Sections 20.18(e)-(h), CC Docket No. 94-102, at 8 (July 6, 2001) ("GSM Waiver Request"); Cingular Petition for Limited Waiver of Section 20.18(f), CC Docket No. 94-102, at i (Aug. 30, 2001); Letter from Brian Fontes, Vice-President-Federal Relations, Cingular, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 94-102 (Sept. 28, 2001) ("Fontes Letter").

¹³ See Attachment I (depicting carriers' Phase II solutions by technology (not including Cingular)); see, e.g., United States Cellular Corporation, Petition for Waiver of Sections 20.18(e) and (g) of the Commission's Rules, CC Docket No. 94-102, at 1 (Sept. 10, 2001); Leap Wireless International, Inc., Petition for Partial Waiver of E-911 Phase II Implementation Milestones, CC Docket No. 94-102, at 5 (Aug. 23, 2001); Petition of Northcoast Communications, LLC for Waiver of Phase II E911 Deployment Requirements, CC Docket No. 94-102, at 1 (Sept. 28, 2001); Western Wireless Corp., Petition for Waiver of Section 20.18(g), CC Docket No. 94-102, at 6 (Aug. 31, 2001); Airtell Wireless, LLC, Petition for Waiver of Section 20.18(g) of the Rules, CC Docket No. 94-102, at 4 (Sept. 26, 2001); Leaco Cellular, Inc., Petition for Waiver Sections 20.18(e) and (g) of the Commission's Rules, CC Docket No. 94-102, at 2 (Sept. 20, 2001); D&E/Omnipoint, LP, Petition for Waiver of the E-911 Phase II Location Technology Implementation Rules, CC Docket No. 94-102, at 1 (June 20, 2001); Alltel Communications, Inc., Petition for Waiver of Sections 20.18(e) and (g) of the Commission's Rules, CC Docket No. 94-102, at 4 (June 25, 2001); Triton PCS License Company, LLC, Petition for Waiver of the E911 Phase II Location Technology Implementation Rules, CC Docket No. 94-102, at 7 (Aug. 3, 2001).

vast majority of these parties indicated that it would not be possible to begin selling compliant handsets until the third and fourth quarter of 2002.¹⁴

On July 6, 2001, Cingular sought a waiver of the Commission's Phase II E911 rules that would permit it to deploy E-OTD as a handset-based solution in its GSM markets and a switch-based solution for its TDMA markets.¹⁵ Based on discussions with PSAPs and the Commission, Cingular withdrew the portion of the waiver request dealing with its TDMA networks. On August 30th, Cingular filed a new waiver request seeking to deploy TruePosition's network-based solution in markets utilizing only the TDMA and AMPS air interfaces. As a result of these efforts, APCO characterized Cingular as the new leader in E911 implementation.¹⁶

Cingular's waiver request documented the extensive efforts undertaken by Cingular and its parent companies to locate compliant Phase II location technologies.¹⁷ No technology could be found, however, that was capable of meeting both the accuracy and deployment requirements

¹⁴ See Attachment II (depicting carriers' proposed handset deployment schedules for handset and hybrid solutions (not including Cingular)); *see, e.g.*, USCC Petition at 12; Leap Petition at 18; Northcoast Petition, at 2; Airtell Petition at 7; Inland Cellular Telephone Co., Petition for Limited Waiver of Sections 20.18 (e) and (g) of the Rules, CC Docket No. 94-102 at, 8 (July 31, 2001); 3 Rivers PCS, Inc., d/b/a 3 Rivers Wireless, Request for Rule Waiver, CC Docket No. 94-102, at 4 (Sept. 10, 2001); Leaco Cellular, Inc., Petition for Waiver Sections 20.18(e) and (g) of the Commission's Rules, CC Docket No. 94-102, at 9 (Sept. 20, 2001); North Dakota Network Co., Petition for Waiver of E911 Phase II Location Technology Implementation Rules, CC Docket No. 94-102, at 7 (Sept. 26, 2001); CT Cube, Inc., d/b/a West Central Wireless, Petition for Limited Waiver of Sections 20.18(e) and (g) of the Commission's Rules, CC Docket No. 94-102, at 9 (Sept. 19, 2001).

¹⁵ See GSM Waiver Request.

¹⁶ "Wireless Gets an Incomplete on E911 Report Card from NENA," RCR Wireless News at 3 (Sept. 10, 2001) (stating that Thera Bradshaw, president-elect of APCO, characterized Cingular as "the leader in the wireless industry in deploying E911 Phase II service"); "House Members Urge FCC to Stick to E911 Deadline," Telecommunications Reports, at 13-14 (noting that Ms. Bradshaw praised Cingular's efforts and provided a good example for other carriers to follow).

¹⁷ See GSM Waiver Request at 8-16, Attachments B-D.

set forth in the Commission's rules.¹⁸ Cingular thus sought approval to utilize the E-OTD handset-based Phase II solution and deploy this solution at a particular schedule in its GSM markets. At that time, vendors indicated that E-OTD handsets would be available for deployment prior to the October 1, 2001 rule deadline and thus Cingular proposed an aggressive deployment schedule.¹⁹ Moreover, E-OTD had become the *de facto* standard for GSM networks.²⁰

A waiver was necessary because E-OTD would not be capable of meeting the accuracy standards for handset-based solutions at the outset.²¹ The industry consensus was that E-OTD would be capable of satisfying the handset accuracy requirement by October 1, 2003.²² In order to satisfy the Commission's requirement that carriers come as close as possible to full compliance, Cingular only requested a temporary waiver of the accuracy requirement for handset-based solutions and "commit[ted] to an aggressive handset rollout" based on vendor commitments. Cingular also committed to deploying a "safety net" location technology that would supply interim location information while E-OTD was being deployed in its GSM markets. Under this proposal, deployment of the safety net – which would locate 67 percent of

¹⁸ *See id.*

¹⁹ *See* Attachment III, Letter from Brian Kober, Vice President and Director, PCS North American Product Operations, Motorola, Inc., to Frank Boyer, Vice President, Supply Chain and Wholesale Services, Cingular Wireless, at 1 (Nov. 8, 2001) ("Kober Letter"); GSM Waiver Request at 26-27 & n.79.

²⁰ *See* GSM Waiver Request at 17. Cingular pointed out that the Commission had recognized that E-OTD "may be the only method available to GSM carriers for compliance with Phase II for some time." GSM Waiver Request at 17 (citing *Fourth MO&O*, 15 FCC Rcd. at 17461-62).

²¹ The technology was capable, however, of satisfying the accuracy requirement for network-based solutions. *See* GSM Waiver Request at 18; *Order* at ¶¶ 15, 19.

²² *See* GSM Waiver Request at 18 (citing *Fourth MO&O*, 15 FCC Rcd. at 17464); *Order* at ¶¶ 15, 19.

callers within 1000 meters – would commence in first quarter 2002 and would be fully deployed by second quarter 2002.²³

In September 2001, Cingular began receiving information from vendors creating doubts about whether an E-OTD handset model would be available prior to the October 1, 2001 deadline. Throughout September, Cingular attempted to clarify the commercial release dates for E-OTD handsets.

When this information was not forthcoming, Cingular contacted the Wireless Telecommunications Bureau staff to determine whether the record should be updated. It was advised to inform the Commission in writing, prior to October 1, 2001, of the most recent vendor positions that compliance with the schedule proposed in the waiver would be impossible, even though Cingular did not have sufficient information upon which to base a new schedule. Accordingly, on September 28, 2001 Cingular notified the FCC by letter that it would be impossible to satisfy the deployment schedule proposed in its waiver based on vendor information and that new dates would be proposed once reliable information could be obtained.²⁴ A few days later, the only other GSM carrier that committed to meeting the October 1st deadline notified the FCC that it would be impossible to commence deployment on that date.²⁵

Cingular Waiver Decision

The initial deadline for deploying Phase II E911 solutions passed on October 1, 2001 and not a single GSM carrier met the deadline.²⁶ On October 12, 2001, the Commission released the

²³ See GSM Waiver Request at i, 28.

²⁴ See Fontes Letter; *see also* Kober Letter at 1.

²⁵ Third Semi-Annual Report of VoiceStream Wireless Corporation on Its E911 Implementation Plan, CC Docket No. 94-102 (Oct. 2, 2001) (“VoiceStream Implementation Report”).

²⁶ Since 1995, Cingular and other covered carriers have been informing the Commission that no technology exists that could satisfy the Phase II requirements. See GSM Waiver Request (continued on next page)

subject *Order* requiring Cingular to meet the superceded handset deployment deadlines originally proposed in its waiver request for GSM markets. The *Order* refused to consider Cingular's TDMA waiver request and referred the issue of whether Cingular violated the October 1, 2001 deadline for both its GSM and TDMA networks to the Enforcement Bureau.²⁷ The referral with respect to compliance with the GSM handset deployment requirements was made even though Cingular had informed the Commission that compliance therewith was impossible.²⁸ The Commission compounded the problem by finding "Cingular's proposed handset deployment schedule to be an integral component of its overall request for relief"²⁹ and therefore rejecting Cingular's attempt to modify its proposed handset deployment schedule. Specifically, the Commission stated:

we reject Cingular's late-filed attempt to modify its deployment schedule and will address any failure to meet its deadlines through the enforcement process.³⁰

The Commission granted the accuracy portion of Cingular's GSM waiver without modification, but conditioned this relief on E-OTD handsets supplying location information with an accuracy of 50 meters/67 percent of calls and 150 meters/95 percent of calls by October 1, 2003.³¹ The Commission also required Cingular to *complete* the Ericsson and Nortel switch upgrades necessary for E-OTD deployment by December 1, 2002 and to supply Phase II information by December 31, 2002 to all PSAPs with outstanding requests as of June 30, 2002.³²

at 4-7. Sprint PCS made a small number of handsets available in CDMA markets on October 1, 2001. No other carrier, GSM or otherwise, met this deadline.

²⁷ See *Order* at n.10, ¶ 23.

²⁸ See *id.* at ¶ 23.

²⁹ *Id.*

³⁰ *Id.*

³¹ See *id.* at ¶¶ 29-30.

³² See *id.* at ¶ 31.

Similarly, the Commission required Cingular to *begin* deploying its proposed “safety net” solution for subscribers without E-OTD handsets by March 31, 2002 and complete deployment by June 30, 2002.³³

With regard to the handset deployment deadlines established in the *Order*, as well as those contained in the E911 rules, the Commission appeared to rule that the failure to satisfy an E-OTD deployment benchmark will result in Cingular being automatically deemed non-compliant and referred to the Enforcement Bureau for sanction.³⁴ The FCC also ruled that changes in vendor positions concerning the availability of compliant equipment would not be considered relevant to whether a carrier was in violation of E911 rules or conditions.³⁵

Other E911 Developments

On the same day it issued the *Order*, the Commission (1) granted the requests of Verizon and Nextel to waive the October 1, 2001 handset deployment deadline due to the unavailability of handsets from vendors;³⁶ and (2) issued a blanket waiver of the October 1, 2001 deadline for all small and mid-sized CMRS providers, whether or not they had filed waivers.³⁷ No explanation was provided why the October 1, 2001 handset deployment deadline was critical and apparently unwaivable for Cingular’s GSM markets, but was waivable for all other requesting carriers.

³³ *Order* at ¶ 32.

³⁴ *See id.* at n.66.

³⁵ Such information was deemed relevant only for the purpose of mitigating the sanction associated with the rule violation. *See id.* at ¶ 23.

³⁶ *See Wireless Implementation Plan of Nextel Communications, Inc.*, CC Docket No. 94-102, *Order*, FCC 01-295, at ¶19 (rel. Oct. 12, 2001); *Request for Waiver by Verizon Wireless*, CC Docket No. 94-102, *Order*, FCC 01-299, at ¶¶ 19, 23 (rel. Oct. 12, 2001).

³⁷ *See Commission Establishes Schedule for E911 Phase II Requests by Small and Mid-Sized Carriers*, CC Docket No. 94-102, *Public Notice*, FCC 01-302 (rel. Oct. 12, 2001) (“Mid-Sized Carrier Notice”); *Wireless Telecommunications Bureau Provides Guidance on Filings by Small and Mid-Sized Carriers Seeking Relief from Wireless E911 Phase II Automatic Location Identification Rules*, CC Docket No. 94-102, *Public Notice*, DA 01-2459 (rel. Oct. 19, 2001).

A majority of Commissioners issued statements recognizing the difficulties faced by carriers attempting to meet the October 1, 2001 deadline given the necessary reliance on vendors:

- Commissioner Abernathy: "Denial [of the waivers] would not lead to the miraculous introduction of equipment by manufacturers or any other silver bullet solution. . . . It also could mean that some carriers walk away from E911 and challenge the Commission's E911 mandate in court with the potential for even greater delays. As discussed above, *the E911 deadlines and performance requirements were largely aspirational* . . . a court challenge prompted by *unrealistic policies* could jeopardize the entire program. . . . It is a mistake to equate manufacturer conduct with carrier conduct and to punish one for the acts and omissions of the other."³⁸
- Commissioner Martin: "We are told by manufacturers and suppliers that meeting today's deadlines is a *practical impossibility*."³⁹
- Commissioner Copps: "Many manufacturers have not made equipment and software upgrades available quickly enough."⁴⁰

Thereafter, Cingular timely filed this Petition for Reconsideration pursuant to Section 405 of the Communications Act and Section 1.106 of the Commission's rules.⁴¹

DISCUSSION

I. IT WAS ERROR TO REQUIRE CINGULAR TO COMPLY WITH A DEPLOYMENT SCHEDULE THAT THE FCC KNEW WAS TECHNOLOGICALLY IMPOSSIBLE TO SATISFY

It was clear error for the Commission to require Cingular to do the impossible – deploy location-capable handsets by October 1, 2001. This was done knowing full well that the

³⁸ *Order*, Separate Statement of Commissioner Kathleen Abernathy at 3 ("Statement of Commissioner Abernathy").

³⁹ *Id.*, Separate Statement of Commissioner Kevin Martin at 1 (emphasis added).

⁴⁰ *Id.*, Separate Statement of Commissioner Michael Copps at 1 ("Statement of Commissioner Copps"). Commissioner Copps also indicated that carriers should not seek further extensions because of vendor problems or because the Commission granted other carriers "far more lenient compliance schedules than others." *Id.*

⁴¹ *See* 47 U.S.C. § 405; 47 C.F.R. § 1.106.

deadline could not be met.⁴² Compounding this problem, the FCC made the accuracy waiver dependent on satisfying the original schedule. Similarly, because the entire handset deployment schedule initially proposed by Cingular was dependent upon handsets being available and of these handset sales commencing October 1, 2001, the schedule set by the Commission was completely unrealistic. This was unreasoned decision-making.

A. The Commission Erred In Ignoring Evidence Of Technological Impossibility In Ruling On Cingular's E-OTD Handset Deployment Waiver Request

It is a fundamental principle of administrative law that:

agency action [must] be “based on a consideration of the relevant factors, ...and rest on reasoned decisionmaking in which the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”⁴³

The Commission is equally obliged to address and resolve substantial and material factual issues based on a review of the whole record, and it must explain its resolution of those issues.⁴⁴ As a matter of law, this analysis requires the Commission to consider and address significant issues that are raised in *ex parte* filings.⁴⁵

⁴² Cingular has no current objection to the deadlines for necessary network modifications and deploying a safety-net solution. As discussed below, however, the Commission must consider revising these deadlines if Cingular later receives information from its vendors that the deadlines will be impossible to satisfy.

⁴³ *United States Telecom Ass'n v. FCC*, 227 F.3d 450, 461 (D.C. Cir. 2000) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); see also *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

⁴⁴ See, e.g., *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000); *AT&T Corp. v. FCC*, 86 F.3d 242, 247 (D.C. Cir. 1996); *City of Brookings Municipal Tel. Co. v. FCC*, 822 F.2d 1153, 1167-69 (D.C. Cir. 1987).

⁴⁵ See *AT&T Corp.*, 86 F.3d at 247; *MCI WorldCom*, 209 F.3d at 765.

Courts have determined that “impossible requirements imposed by an agency are perforce unreasonable”⁴⁶ and that the “law does not compel the doing of impossibilities.”⁴⁷ Once technological impossibility or infeasibility is raised, the Commission must address such claims.⁴⁸ To establish that its rules are “based on a consideration of the relevant factors” and not “a clear error of judgment,”⁴⁹ the “record must establish that the required technology is feasible, not merely *possibly* feasible.”⁵⁰ The Commission also must “reexamine the public interest basis of rules when the basis asserted by the Commission no longer exists.”⁵¹ Rules that cannot be complied with have no valid basis and purpose and thus are invalid.

The Commission ignored the voluminous record in CC Docket 94-102 that compliance with the E911 requirements was impossible. For example, the FCC ignored evidence repeatedly submitted by Cingular and others since 1995 that the rules were impossible to satisfy.⁵² The Commission also refused to consider the extensive analysis provided in Cingular’s waiver request, including a twenty-six page document summarizing tests of available technologies,

⁴⁶ *Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 940 (D.C. Cir. 1991).

⁴⁷ *Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1530 (11th Cir. 1996), *quoting* Black’s Law Dictionary 912 (6th ed. 1990) (“*Lex non cogit ad impossibilia*: The law does not compel the doing of impossibilities”).

⁴⁸ *Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1294 (9th Cir. 1977) (citing *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 402 (D.C. Cir. 1973)), *cert. denied*, 417 U.S. 921 (1974).

⁴⁹ *Overton Park*, 401 U.S. at 415-16.

⁵⁰ *Bunker Hill Co.*, 572 F.2d at 1301 (emphasis in original); *see Essex Chemical Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 969 (1974). (noting that the feasibility determination must be based on record evidence, not a “subjective understanding of the problem or ‘crystal ball inquiry’”).

⁵¹ *Review of Pioneer’s Preference Rules*, ET Docket No. 93-266, *Notice of Proposed Rulemaking*, 8 FCC Rcd. 7692, 7693 n.5 (1993); *see Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir.), *cert. denied*, 506 U.S. 816 (1992) (stating that “an agency may be forced to reexamine its approach ‘if a significant factual predicate of a prior decision ... has been removed’”); *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) (stating that “the vitality of conditions forging the vital link between Commission regulations and the public interest is ... essential to their continuing operation”); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752 (6th Cir. 1995).

⁵² *See* note 12 *supra*; *see also* GSM Waiver Request at 4-7.

demonstrating that there was no Phase II compliant solution.⁵³ The failure to consider this information is particularly troubling given the Commission's acknowledgement that:

During the course of the E911 proceeding, the Commission recognized that *the E911 deployment schedule was aggressive in light of the need for further technological advancement*. Nonetheless the Commission predicted that ALI technologies would generally be available in sufficient time for carriers to comply.⁵⁴

Despite the fact that no compliant technology existed at the time the rule was adopted, the FCC fails to say a word about whether a compliant technology has developed for GSM networks, even though the viability and enforceability of the rules depends upon it. At no point does the Commission assert that a particular GSM solution will satisfy the rules. No factual findings are made and no conclusions are reached concerning feasibility. Rather, the FCC proceeds to require Cingular to do things that it has shown cannot be done technologically. This was error.

The treatment of Cingular's September 28th *ex parte* is equally troublesome. The FCC acknowledges its contents -- that compliance with the deadlines proposed in the waiver request is technologically impossible based on the most current vendor information -- but simply refuses to consider this critical information and refers Cingular to the Enforcement Bureau. This *ex parte* had to be considered given its relevance.⁵⁵ The FCC was under no statutory or rule deadline to decide Cingular's waiver.

The Commission's ruling that evidence of impossibility (vendor statements regarding the availability of E911-compliant equipment) could not be utilized to excuse non-compliance (except with regard to sanction) was also unlawful. It fenced off the key element in any technological impossibility showing by carriers because they do not make the necessary

⁵³ See GSM Waiver Request at 8-34 & Attachment D.

⁵⁴ Order at ¶ 6 (citing *Fourth MO&O* at 17457-58) (emphasis added).

⁵⁵ See *AT&T Corp.*, 86 F.3d at 247; *MCI WorldCom*, 209 F.3d at 765.

equipment. No reason is given why vendor readiness is not a relevant factor. This ruling eviscerates the legal doctrine.

Moreover, the Commission itself utilizes equipment unavailability as a reason for granting other waivers.⁵⁶ Thus, even though the Commission does not address impossibility directly (which is itself error), it attempts to foreclose any future use of the doctrine, while relying on the banned defense in granting waivers. This is the height of arbitrary and capricious decision-making.

The *Order* also is defective because it does not contain a “rational connection between the facts found and the choice made.”⁵⁷ Had the FCC engaged in the required fact-finding based on the record, it could have come to only one conclusion: compliance with the E911 rules for GSM carriers is impossible because equipment is not available. Thus, the FCC would have no basis to enforce the October 1 deadline, let alone condition accuracy relief on satisfaction thereof.

The Commission must reconsider whether the evidence supports retention of the October 1, 2001 deadline (and related benchmarks) imposed on Cingular with respect to the sale of E-OTD handsets. Availability must not be ignored because where technological infeasibility has been established a carrier cannot be deemed in violation of the underlying requirement. As Commissioner Abernathy noted:

Whenever the Commission mandates various technological capabilities by licensees, it runs into the very real limits imposed by manufacturing capabilities and timelines. But it is a mistake to equate manufacturer conduct with carrier conduct and to punish one for the acts and omissions of the other. . . . [I]t is unreasonable for the Commission automatically to “begin an enforcement action” against a carrier because a vendor “fails to make equipment

⁵⁶ See pages 19-20 *infra*.

⁵⁷ *Burlington Truck Lines*, 371 U.S. at 168 ; see *Cincinnati Bell*, 69 F.3d at 768.

... available on time” based on the carriers’ “significant control over their vendors.”⁵⁸

Although Cingular agrees with the Commission that it is important to deploy Phase II information rapidly, granting a waiver with conditions that cannot be satisfied goes too far. The Commission should reconsider this decision and only require Cingular to deploy location-capable handsets when they become available from manufacturers.

B. The FCC Should Adjust Cingular’s E-OTD Deployment Schedule To Conform To Technological Reality And Rescind Its Referral To The Enforcement Bureau

Throughout this docket, Cingular has routinely informed the Commission of the status of Phase II technologies. Cingular will continue doing so more formally under the reporting requirements imposed by the *Order*. Moreover, the deadlines proposed by Cingular are reasonable. With the exception of a handful of carriers such as Cingular and VoiceStream, no covered carrier committed to deploying a Phase II GSM solution prior to the second quarter 2002.⁵⁹ The vast majority of carriers indicated that the earliest these solutions could be deployed was in the third or fourth quarter 2002. VoiceStream, a GSM provider, also confirmed that E-OTD handsets would not be available on October 1, 2001.⁶⁰

Cingular has now received more concrete information from its handset vendors that E-OTD capable handsets will be available for sale to consumers in late second quarter 2002 at the earliest.⁶¹ There is evidence to support these claims because E-OTD handsets are now available

⁵⁸ Statement of Commissioner Abernathy at 2.

⁵⁹ With the exception of Cingular and VoiceStream, and their affiliates, no GSM carrier committed to deploying location-capable handsets on GSM networks prior to October 1, 2001. In fact, no other GSM carrier committed to a date upon which handsets would be available. Rather, these carriers committed to meeting 50 and/or 100 percent deployment benchmarks.

⁶⁰ See VoiceStream Implementation Report.

⁶¹ See Attachment IV, Letter from Anders Olin, Executive Vice President and General Manager, Ericsson, to Bill Clift, Chief Technical Officer, Cingular Wireless LLC, at 2 (October (continued on next page))

for testing.⁶² Thus, assuming the availability of labs and live networks for testing,⁶³ Cingular expects handsets to be available from a variety of vendors by third quarter 2002.⁶⁴

Based on these commitments, the Commission should reconsider and revise the handset deployment schedule imposed in the *Order* as follows:

- Cingular must make one E-OTD handset model available for sale by September 1, 2002;
- 50% of all GSM handsets sold in Cingular's markets must be E-OTD capable by February 28, 2003;
- 100% of all GSM handsets sold in Cingular's markets must be E-OTD capable by June 30, 2003; and
- 95% of Cingular's GSM customers must have location-capable handsets by December 31, 2005.

Cingular continues to strive to deploy Phase II E911 in an expeditious manner.⁶⁵ Given the importance of these services to consumers, competitive forces will ensure that Cingular makes E-OTD handsets available as soon as they are commercially available. Amending the deployment schedule in this manner does not alter the ultimate deadline for completing Phase II E911 deployment – December 31, 2005.⁶⁶ Cingular agrees with Commissioner Copps that this

18, 2001) ("Olin Letter"); Attachment V, Letter from Kari Pekka Wilska, President Nokia Inc. to Frank Boyer, Vice President, Supply Chain and Wholesale Services, Cingular Wireless LLC, at 2 (October 19, 2001) ("Wilska Letter").

⁶² See Kober Letter at 1.

⁶³ See Kober Letter at 1-2; Wilska Letter at 2; Olin Letter at 2; Attachment VI, Letter from Gary R. Donahee, President, The Americas, and Pascal Deboh, President, Wireless Networks, Nortel Networks Corporation, to William C. Clift, Chief Technical Officer, and Frank Boyer, Vice President, Supply Chain and Wholesale Services, Cingular Wireless, LLC (Oct. 16, 2001).

⁶⁴ See Kober Letter at 1-2; Olin Letter at 2; Wilska Letter at 2.

⁶⁵ Cingular anticipates that 75% of its GSM handsets will be E-OTD capable by March 31, 2003.

⁶⁶ See *Order*, Separate Statement of Chairman Michael Powell at 1 ("All of these [waiver] decisions are designed to pursue single-mindedly one objective: the full availability of enhanced 911 by the original [December 31, 2005] deadline established by the Commission").

deadline, by which 95 percent of all handsets in markets where a handset-based solution has been deployed must be location-capable, is critical.⁶⁷ “Carriers, manufacturers, PSAPs, and the Commission must rally around the goal of making E911 fully available to the American people before the end of 2005.”⁶⁸ As Commissioner Abernathy also noted:

The Commission’s critical date for E911 Phase II deployment is December 31, 2005 when 95% of all handsets must be E911 Phase II compatible and achieve our accuracy requirements.... Despite the Commission’s efforts to adopt a plan developed through a consensus process with all interested parties, those interim predictions on the pace of technology simply missed their mark.⁶⁹

Thus, Cingular’s revised deployment schedule does not seek to extend the final E911 deadline, but merely seeks an interim deployment schedule that conforms to the commercial availability of E911 technologies.

II. THE COMMISSION FAILED TO APPLY A UNIFORM WAIVER STANDARD

Under the Administrative Procedure Act, courts must “‘hold unlawful and set aside agency action’ that is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”⁷⁰ Courts have interpreted this provision as prohibiting the disparate treatment of similarly situated applicants.⁷¹ Although the party claiming disparate treatment carries a heavy burden, the burden “is carried when an agency arbitrarily waives a deadline in one case but not in another.”⁷²

⁶⁷ See Statement of Commissioner Copps at 5.

⁶⁸ *Id.*

⁶⁹ Statement of Commissioner Abernathy at 2.

⁷⁰ *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1221 (D.C. Cir. 1999) (quoting 5 U.S.C. § 706(2)(A)).

⁷¹ See *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965); *Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

⁷² *Green Country Mobile-phone, Inc. v. FCC*, 765 F.2d 235, 238 (D.C. Cir 1985) (citing *WAIT Radio v. FCC*, 459 F.2d 1203, 1207 (D.C. Cir 1969)).

The FCC's "discretion to proceed ...through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for waiver based on special circumstances."⁷³ Moreover, waiver decisions must be "based on a rational waiver policy"⁷⁴ that "obviates discriminatory approaches."⁷⁵ The *Order* violates these principles.

The Commission adopted the following three-prong standard that applicants must meet when seeking a waiver of the Phase II E911 rules:

- Waiver requests must "be specific, focused and limited in scope, and with a clear path to full compliance;"
- Waiver applicants must demonstrate that they will deploy "a solution that comes as close as possible, in terms of providing reasonably accurate location information as quickly as possible" and must document these efforts; and
- Waiver applicants must specify the solutions they considered and explain why none could be employed in a way that complies with the Phase II rules.⁷⁶

The Commission refused to consider evidence provided by Cingular that compliance with the October 1, 2001 deadline was no longer possible,⁷⁷ which is directly relevant to all three prongs of the waiver standard. The refusal to consider evidence required by its waiver standard constitutes reversible error. It is inherently unreasonable to adopt a waiver standard requiring carriers to specify the Phase II solutions considered and explain why they could not be deployed, yet preclude consideration of this evidence once supplied by carriers. In effect, by prohibiting

⁷³ *Keller Communications, Inc. v. FCC*, 130 F.3d 1073, 1076 (D.C. Cir. 1997). Waivers, however, cannot be utilized to save unsound rules. See *Alltel Corp. v. FCC*, 838 F.2d 551, 561-62 (D.C. Cir. 1988); *National Rural Telecomm. Ass'n v. FCC*, 988 F.2d 174, 181 (D.C. Cir. 1993); *Allenco Communications, Inc. v. FCC*, 201 F.3d 608, 621 (5th Cir. 2000). The FCC's rules also provide for the availability of waivers. See 47 C.F.R. § 1.3.

⁷⁴ *Northeast Cellular*, 897 F.2d 1164 (citing *WAIT Radio*, 418 F.2d 1153).

⁷⁵ *Northeast Cellular*, 897 F.2d at 1164, 1165 (citing *WAIT Radio*, 418 F.2d at 1159).

⁷⁶ *Fourth MO&O*, 15 FCC Rcd. at 17457-58.

⁷⁷ *Order* at ¶ 23.

key evidence of impossibility, the Commission has eviscerated the waiver standard and eliminated the safety valve required by *WAIT Radio* and its progeny.

The *Order* also is defective because it applies a different waiver standard than applied to other similarly situated waiver applicants. Specifically, the Commission considered “impossibility” as a basis for waiving the October 1, 2001 deadline for Verizon and Nextel, but excluded this defense from consideration with respect to Cingular’s GSM waiver request. Nextel’s request for waiver of the Phase II implementation deadline was granted because of limited “options for location technologies.”⁷⁸ Similarly, the Commission granted Verizon a waiver of these deadlines because the new deadlines proposed by Verizon were “based on vendor negotiations, and [because] it expects to meet those deadlines, barring unforeseen delays in product availability and delivery.”⁷⁹ The Commission determined that:

Verizon’s revised compliance plan schedules for handset activation, too, are the result of its efforts to identify realistic availability dates and represent a clear path to full Phase II compliance. Verizon expects widespread availability of new handsets with AGPS/AFLT capability during the second half of 2002, and it plans to meet the 100 percent benchmark in our rules by December 2003. It chronicles communications with its “core suppliers” to achieve handset availability as quickly as the design, manufacture and distribution process will permit. Given these circumstances, we conclude that Verizon has committed to an aggressive and clear path toward full compliance.⁸⁰

No rationale was provided to explain why equipment unavailability was an appropriate basis for waiving the rules for these applicants, but not for Cingular. Similarly, no explanation

⁷⁸ *Wireless Implementation Plan of Nextel Communications, Inc.*, CC Docket No. 94-102, *Order*, FCC 01-295, at ¶19 (rel. Oct. 12, 2001).

⁷⁹ *Request for Waiver by Verizon Wireless*, CC Docket No. 94-102, *Order*, FCC 01-299, at ¶19 (rel. Oct. 12, 2001); *see id.* at ¶ 23 (noting that Verizon’s deployment schedule is reasonable because it was based on the availability of switch upgrades and the availability of compliant handsets from manufacturers).

⁸⁰ *Id.* at ¶ 26.

was provided regarding why compliance with the October 1, 2001 deadline was “an integral component” of Cingular’s waiver request, but was apparently of little importance to the other waiver requests.

Similarly, no rationale was provided to explain why it was appropriate to waive the “critical” deadline for carriers that never even sought relief, yet deny Cingular relief after it demonstrated that the deadline was impossible to meet. Quite the opposite, the *Public Notice* waiving the deadline for every small to mid-sized covered carrier (all carriers with the exception of the six major national wireless carriers that were granted relief in separate orders) indicated that the deadline was not critical.⁸¹ The Commission waived the deadline simply because additional time may assist small and mid-sized carriers to prepare Phase II deployment plans and provide a better record on Phase II deployment issues.⁸² The failure to justify this disparate treatment constitutes reversible error.

Further, the three-prong waiver standard applied to Cingular differs from the test applied to all small and mid-sized covered carriers. For these carriers, the standard for waiving the October 1, 2001 deadline was whether additional time might assist the carriers with regard to the preparation of a Phase II deployment plan, which in turn would further the development of a better record on Phase II deployment.⁸³ If Cingular had notice of this standard, it clearly would have qualified for a waiver.

Reconsideration is particularly appropriate here because the *Order* failed to give Cingular’s waiver *requests* the “hard look” required by law.⁸⁴ The *Order expressly states* that evidence required by the waiver standard applied to Cingular’s GSM waiver request was not

⁸¹ See *Mid-Sized Carrier Notice* at 1.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *WAIT Radio*, 418 F. 2d at 1157.

considered. The *Order* also indicates that the Commission will not consider Cingular's TDMA waiver request at all.⁸⁵ The FCC said it simply could not get to that request, even though there was no deadline for an FCC decision. The matter was then referred to the Enforcement Bureau and Cingular was arbitrarily denied its right to have its waiver request considered.⁸⁶ At the same time, others received relief without even filing a waiver request, further underscoring the fact that no schedule or requirement existed for filing a waiver by a date certain.

The *Order* appears to be the “product of ‘result-oriented’ rationalization,” or other impermissible factors, rather than the product of reasoned decision-making.⁸⁷ APCO has characterized Cingular as a leader in E911 implementation,⁸⁸ yet the Commission appears to be arbitrarily attempting to make an example of Cingular regarding E911 compliance. Cingular was the only GSM carrier referred to the Enforcement Bureau.⁸⁹ The *Order* criticized Cingular for filing a TDMA waiver request on August 30, 2001 “[b]ecause the timing of Cingular’s proposal for its TDMA network *did not permit Commission consideration.*”⁹⁰ The *Order* also criticized Cingular’s September 28th notification that compliant equipment would not be available prior to

⁸⁵ See *Order* at n.10.

⁸⁶ See *Salzer v. FCC*, 778 F.2d 869, 874-76 (D.C. Cir. 1985) (vacating dismissal of application because FCC failed to give clear notice of filing deadlines and requirements).

⁸⁷ See *Continental Airlines v. CAB*, 519 F.2d 944, 957 (D.C. Cir. 1975) (noting that a decision that ignores contradictory evidence “triggers scrutiny” to ensure that the decision was not “based on impermissible or irrelevant factors” or “a product of ‘result oriented’ rationalization”).

⁸⁸ See RCR Wireless News, *supra* note 16, at 3 (stating that the president-elect of APCO characterized Cingular as “the leader in the wireless industry in deploying E911 Phase II service”).

⁸⁹ The only other carrier “referred” to enforcement was AT&T Wireless Services, Inc. (“AWS”) with respect to its TDMA solutions. The referral was made because the solution proposed in the AWS waiver, as amended, was presented too late for consideration.

⁹⁰ *Order* at n.10 (emphasis added).

October 1, 2001 as a “late-filed attempt to modify its deployment schedule” for GSM networks.⁹¹ These criticisms are inappropriate given that the Commission failed to establish deadlines for the submission of waiver requests. Moreover, the timeliness criticisms are troublesome given that the Commission granted every small and mid-sized carrier additional time -- until November 30, 2001 -- to prepare any necessary waiver requests and Phase II deployment plans.⁹² The Commission obviously had no deadline for acting and Cingular kept the FCC constantly informed of the status of available products and other complicating factors (*e.g.*, the need to make certain air interface changes). No explanation was provided why small and mid-sized carriers should be afforded additional time, but Cingular’s August 30th TDMA waiver request was filed too late for consideration. Accordingly, the Commission should reconsider referring to the Enforcement Bureau the issue of E911 compliance on Cingular’s TDMA and GSM networks and grant the relief requested herein.

III. IT WAS ERROR TO ADOPT A “STRICT LIABILITY” STANDARD FOR FUTURE COMPLIANCE

The Commission states that: “To the extent that Cingular fails to satisfy any condition or Commission rule, it will be subject to *possible* enforcement action”⁹³ In the very next paragraph, however, the FCC states that if Cingular does not comply with the Phase II rules and conditions established by the *Order*, “it will be *deemed* noncompliant and referred to the Commission’s Enforcement Bureau for possible action.”⁹⁴ The FCC adds that, “at that time, an

⁹¹ *Order* at ¶ 23.

⁹² *See Mid-Sized Carrier Notice* at 1.

⁹³ *Order* at ¶ 26. It adds that: “We will not entertain requests for additional relief that seek changes in the requirements, schedules, and benchmarks imposed herein absent extraordinary circumstances.” *Id.*

⁹⁴ *Id.* at ¶ 27 (emphasis added).

assertion that a vendor, manufacturer, or other entity was unable to supply compliant products will not excuse noncompliance.”⁹⁵ This approach will not withstand scrutiny.

First, it is not clear whether the Commission has adopted a strict liability standard for determining violations of E911 requirements. Paragraph 27 of the *Order* read alone states that Cingular would be automatically deemed in violation if it simply misses a deadline no matter what the reason. This approach not only violates due process -- notice and opportunity to be heard prior to a finding of violation -- but the Communications Act and the Commission’s rules.⁹⁶ For example, the Commission states that violators may be subject to forfeitures. Under Section 1.80 of the Commission’s rules, which implements Section 503 of the Act, the Commission must publish a notice of *apparent* liability that can be contested before any violation finding can be made.⁹⁷ Similarly, Section 1.89 of the rules, which implements Section 312 of the Act, states that:

any person who holds a license, permit or other authorization appearing to have violated any provision of the Communications Act or any provision of this chapter will, before revocation, suspension, or cease and desist proceedings are instituted, be served with a written notice calling these facts to his or her attention and requesting a statement concerning the matter.⁹⁸

Thus, the Act and the Commission’s rules recognize that fundamental fairness requires notice and an opportunity before adverse action is taken, but the *Order* does not.⁹⁹ Even if the carrier’s

⁹⁵ *Id.*

⁹⁶ As courts have noted, “[u]ltimately, of course, the procedures of the Commission must be measured against the demands of due process as well as the statutory requirements of the Communications Act.” *RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981).

⁹⁷ See 47 U.S.C. §503; 47 C.F.R. §§ 1.80(a)(1) & (f) (forfeitures are one of the sanctions listed for violations of E911 conditions or rules).

⁹⁸ 47 C.F.R. § 1.89.

⁹⁹ See 47 U.S.C. §§ 309, 312(c).

violation is found not deserving of a substantial penalty, it is a blemish on the company's operating record that could affect license renewal or other subsequent action by the Commission.

Second, assuming the Commission changes its procedure to allow a carrier to be heard before deciding whether a violation finding is warranted, that opportunity must be meaningful.¹⁰⁰ Not considering a vendor's inability to deliver on its representations concerning the availability of compliant equipment eliminates any real opportunity to be heard. Cingular is not a manufacturer. It is completely reliant on vendor representations with regard to compliance with E911 requirements. Assuming a carrier has kept the Commission apprised through the reporting process of where things stand with vendors, the failure to receive compliant equipment must be taken into account in deciding whether it violated a benchmark that could have been satisfied.

Moreover, as stated above, the Commission itself has taken such information into account in granting relief. The Commission cannot utilize vendor representations to decide whether there is good cause for a waiver of E911 requirements, yet deem such a defense irrelevant in deciding whether to grant further relief. If such information is important enough to change the carrier's deployment dates, it is clearly material as to whether a carrier is able to comply at a later date.

CONCLUSION

The Commission cannot have it both ways. It cannot leave intact rules that cannot be satisfied, yet refuse to consider waivers that may rely on the key element of compliance -- the availability of a compliant solution from vendors. It also cannot ignore the impossibility doctrine and treat similarly situated waiver applicants differently. Absent reconsideration, the FCC jeopardizes its whole E911 program. As Commissioner Abernathy warned:

the E911 deadlines and performance requirements were largely aspirational and the public safety and wireless communities have

¹⁰⁰ See *Groppi v. Leslie*, 404 U.S. 496, 502 (1972).

worked hard together to make [E911 deployment] possible; a court challenge prompted by unrealistic policies could jeopardize the entire program.¹⁰¹

Accordingly, the Commission should reconsider its decision to require Cingular to meet E-OTD deployment deadlines that cannot be met and adopt the proposed schedule offered herein. The Commission also should reverse its strict liability position and ruling that it will not consider evidence concerning vendor readiness.

Finally, the FCC must consider Cingular's TDMA waiver request, rather than simply refer the matter for enforcement.

Respectfully submitted,

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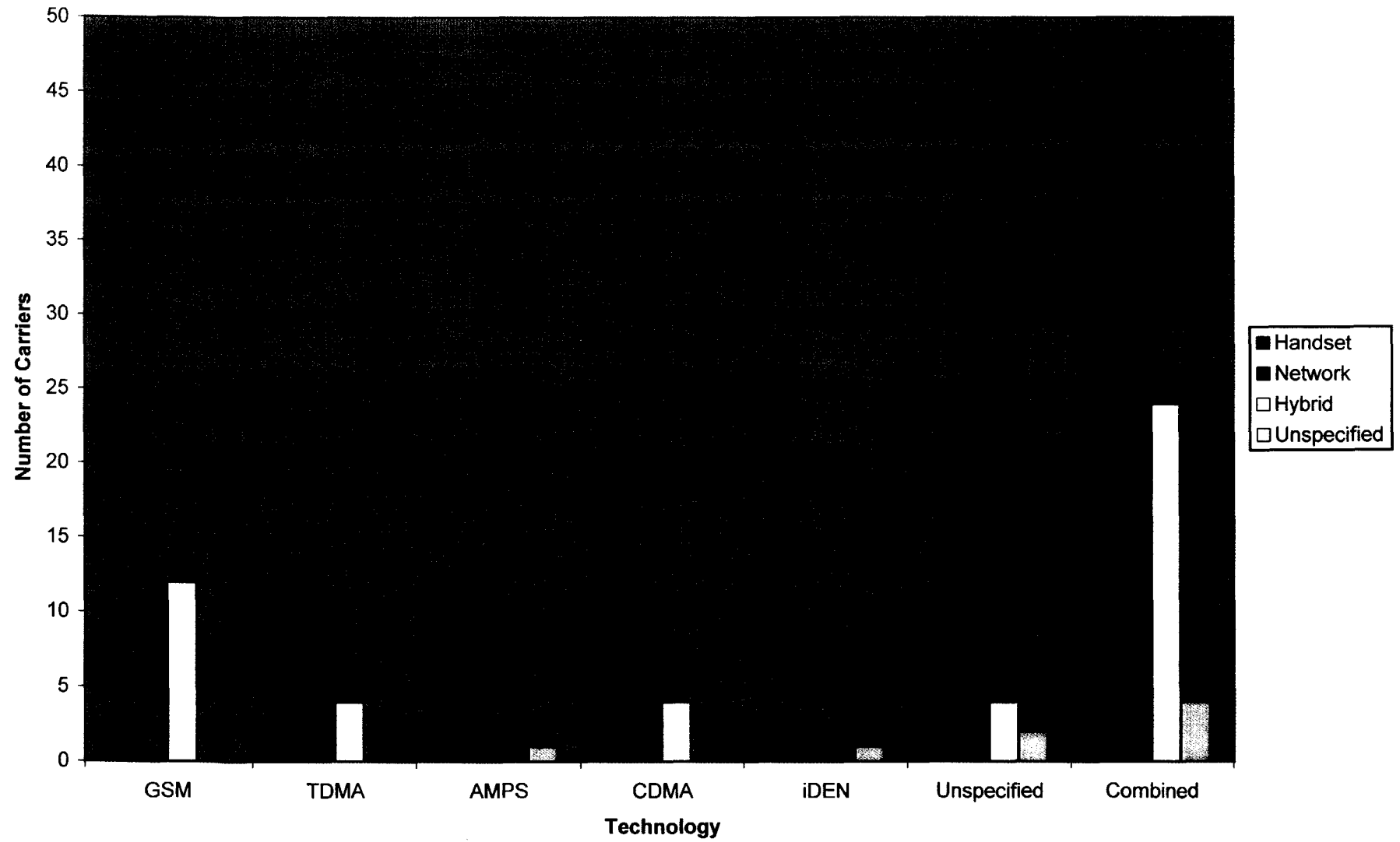
Its Attorneys

November 13, 2001

¹⁰¹ Statement of Commissioner Abernathy at 3.

ATTACHMENT I

Phase II Solutions by Technology



ATTACHMENT II

**Benchmark to Begin Selling and Activating Handsets
(All Technologies Selecting a Handset or Hybrid Solution)**

